

Message Text

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47

ACTION L-02

INFO OCT-01 ARA-06 ISO-00 EB-07 COME-00 CIAE-00 INR-07

NSAE-00 SP-02 AID-05 NSC-05 CIEP-01 TRSE-00 SS-15

STR-01 OMB-01 CEA-01 OPIC-03 XMB-02 IGA-01 /060 W

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R 221318Z FEB 75

FM AMEMBASSY QUITO

TO SECSTATE WASHDC 4560

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E.O. 11652: N/A

TAGS: EINV EC

SUBJECT: CALVO CLAUSE AND RELATED PROVISIONS

REF: STATE 024007

1. ACCORDING TO THE 1945 CONSTITUTION IN FORCE UNDER THE PRESENT GOVERNMENT (EXCEPT AS IT CONFLICTS WITH GOVERNMENT DECREE), ARTICLE 146 READS AS FOLLOWS IN INFORMAL TRANSLATION: BEGIN QUOTE FOREIGN COMPANIES OR INDIVIDUALS WHO ARE CON- CESSIONAIRES OF NATIONAL RESOURCES SHOULD BECOME ESTABLISHED IN THE COUNTRY AND MAY NOT, UNDER ANY CIRCUMSTANCES, CLAIM AN EXCEPTIONAL POSITION OR HAVE RECOURSE TO DIPLOMATIC CLAIMS. END QUOTE. IN THE OPINION OF A LOCAL EXPERT ON COMMERCIAL LAW, THE CALVO CLAUSE IS IMPLICIT IN ALL INVESTMENT CONTRACTS WITH FOREIGN COMPANIES.

2. THE ANDEAN INVESTMENT CODE (DECISION 24) WAS ADOPTED IN 1971 BY THE GOVERNMENT OF ECUADOR. ARTICLE 50 STATES THAT MEMBER COUNTRIES OF THE PACT SHALL NOT GRANT TO FOREIGN INVESTORS ANY TREATMENT MORE FAVORABLE THAN THAT GRANTED TO NATIONAL INVESTORS. ARTICLE 51 CONTINUES THAT BEGIN QUOTE IN NO INSTRUMENT RELATING TO INVESTMENTS OR THE TRANSFER OF TECHNOLOGY SHALL THERE BE CLAUSES THAT REMOVE POSSIBLE CONFLICTS OR CONTROVERIES FROM THE NATIONAL JURISDICTION AND COMPETENCE OF THE RECIPIENT

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COUNTRY OR ALLOW THE SUBROGATION BY STATES TO THE RIGHTS AND

ACTIONS OF THEIR NATIONAL INVESTORS. END QUOTE. THERE IS, HOWEVER, A MENTOD FOR ARBITRATION IN CASE OF DISPUTES AMONG MEMBER COUNTRIES OF THE ANDEAN PACT. THAT IS, THE CONFLICT WILL BE REFERRED TO THE ANDEAN PACT COMMISSION IN ACCORDANCE WITH PROCEDURE OUTLINED IN THE ORIGINAL CARTAGENA AGREEMENT.

3. COMMENT: ALTHOUGH THE CALVO CLAUSE IS LEGALLY IN FORCE IN ECUADOR IN BOTH THE CONSTITUTION AND DECISION 24, IT IS NOT INVOKED AS A PRACTICAL MATTER WHEN THE HOME GOVERNMENT SEEKS INFORMALLY TO ASSIST IN THE RESOLUTION OF DISPUTES INVOLVING FOREIGN INVESTMENTS. NEVERTHELESS, REQUESTING HOME GOVERNMENT ASSISTANCE MAY BE A HIGHLY CHARGED POLITICAL ISSUE DEPENDING ON THE CASE. THE ANDEAN PACT INVESTMENT AGREEMENT HAS BEEN RATHER LIBERALLY INTERPRETED BY THE GOE SINCE RATIFICATION BUT RECENT DEVELOPMENTS INDICATED THAT THE GOE IS BEGINNING TO TIGHTEN CERTAIN PROVISIONS OF DECISION 24.

BREWSTER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: INVESTMENT LAW, LITIGATION, FOREIGN INVESTMENTS, BUSINESS FIRMS
Control Number: n/a
Copy: SINGLE
Draft Date: 22 FEB 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: GolinoFR
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975QUITO01289
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750064-0045
From: QUITO
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t19750221/aaaaasnr.tel
Line Count: 78
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 2
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 75 STATE 024007
Review Action: RELEASED, APPROVED
Review Authority: GolinoFR
Review Comment: n/a
Review Content Flags:
Review Date: 10 SEP 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <10 SEP 2003 by ElyME>; APPROVED <11 SEP 2003 by GolinoFR>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
05 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: CALVO CLAUSE AND RELATED PROVISIONS
TAGS: EINV, EC
To: STATE
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 05 JUL 2006